STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. BURKE, Plaintiff-Appellant/Cross-Appellee, v BURKE RENTAL SERVICES, INC., THE BURKE COMPANY, L.L.C., JOHN C. BURKE, MICHAEL C. BURKE, and KEVIN BURKE, Defendants-Appellees/Cross-Appellants.	UNPUBLISHED March 11, 2008 No. 275828 Macomb Circuit Court LC No. 06-3942-CZ

Before: White, P.J., Hoekstra and Schuette, JJ.

PER CURIAM.

Plaintiff Thomas J. Burke appeals as of right the circuit court's order granting summary disposition to defendants under MCR 2.116(C)(7). Defendants cross-appeal the circuit court's order denying defendants sanctions under MCR 2.114. We reverse the order granting defendants summary disposition, and affirm the order denying defendants sanctions.

The parties executed a settlement agreement in settlement of a prior suit brought by plaintiff. This appeal presents the issue whether the release provision in that settlement agreement bars plaintiff's subsequent suit (instant suit). The circuit court concluded that it did, and granted defendants' motion for summary disposition under MCR 2.116(C)(7).

The corporate defendants, Burke Rental and The Burke Company, are in the business of selling and renting construction equipment, and are closely held corporations in which the individual parties are shareholders. Plaintiff's father founded the Burke family businesses in 1920. In 1956, plaintiff Thomas J. Burke and his two brothers, Michael C. and C. John Burke formed Burke Rental. Plaintiff acted as CEO and President of the Board of Directors of Burke Rental from its inception until approximately 2005, at which time, he alleges, his brother, Michael, and his nephews, John C. and Kevin Burke, ousted him. Defendant John C. Burke is the son of C. John Burke, deceased, and defendant Kevin Burke is defendant Michael Burke's son. Plaintiff's son, Thomas P. Burke, worked for the family businesses as well, but resigned in 2005.

Plaintiff's first suit

On March 29, 2006, plaintiff Thomas J. Burke filed a three-count complaint against defendants seeking to enjoin defendants from allowing life insurance policies insuring him to lapse, and to compel defendants to transfer the policies to him, alleging minority shareholder oppression, breach of verbal contract and breach of fiduciary duty. Plaintiff's complaint alleged that he is a minority shareholder in defendant Burke Rental Services and in Cyril J. Burke, Inc, and that plaintiff and defendants had a verbal agreement that the subject life insurance policies would be kept in place for the purpose of buying out the stock of non-participating stockholders who might otherwise inherit stock of defendant corporations from the insured party. Plaintiff's complaint alleged that his employment with defendant companies was terminated as of March 6, 2006, at the behest of the individual defendants, and that around that date, defendants sent plaintiff a letter indicating that defendants were unable to continue making payments on the life insurance policies and that several policies would lapse. The letter further advised plaintiff that "in lieu of any severance and in exchange for execution and return of the attached termination agreement, the companies will give you the referenced life insurance policies." The complaint alleged that the termination agreement referred to "is unacceptable" and "essentially a one-sided document in favor of the Defendants, which would prevent any lawsuits by the Plaintiff against the Defendants, and any entities related to them, and seeks to terminate any pre-existing agreements between" the parties.

This suit settled and the parties executed a settlement agreement, agreeing as follows:

> 1. The life insurance policies, and all rights and obligations associated therewith, that were the subject of Plaintiff's 1st Amended Complaint and Motion in the lawsuit, (hereinafter, "the policies") shall be, within two (2) days from the date hereof, transferred and assigned by Defendants to the Plaintiff, and shall be hand-delivered to a place of Plaintiff's choosing.
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> 2. The Defendants shall execute and sign all documents necessary to make Plaintiff the sole policy holder and payor with regard to the policies.
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> 3. Upon timely transfer of the policies, Plaintiff shall be solely responsible for the policies, and shall hold Defendants harmless thereon, and Plaintiff shall have all rights and obligations associated with such policies.
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> 4. Defendants are prohibited from canceling or otherwise interfering with the coverage of life insurance provided to the Plaintiff and his beneficiaries in the policies.
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> * * *
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> 6. Upon assignment of each of the policies to the Plaintiff, Plaintiff shall dismiss the lawsuit against Defendants with prejudice.
>
> 7. Neither the existence of this settlement agreement nor the assignment of the policies by Defendants to Plaintiff shall constitute or be construed as an admission of liability or wrongdoing by Plaintiff or Defendants.
>
> * * *

The settlement agreement contained a release provision (¶ 11):

> 11. This executed agreement shall constitute *a full and final release of all of the defendants*, their respective directors, officers, employees, agents and affiliates, *from any and all manner of actions, claims, suits, damages, debts, demands*, and other obligations, *including* any and all liabilities and claims, whether in law or in equity, known or unknown, *which arise out of the matter, transaction and/or occurrence relating to the subject policies of insurance* and existing as of the date hereof, *including*, but not limited to, the claims relating to the policies as they were brought by the Plaintiff in the subject lawsuit. [Emphasis added.]

Following the settlement, the circuit court entered a stipulated order of dismissal with prejudice, without attorney fees or costs to either party.

Plaintiff's second suit

Plaintiff filed a second suit against the same defendants[1] in September 2006, alleging wrongful discharge and breach of fiduciary duty, and seeking an accounting as well as dissolution of defendants Burke Rental Services and The Burke Company. Plaintiff's verified complaint alleged that plaintiff is and has been at all pertinent times part owner/member and an employee of the family businesses, defendants Burke Rental and The Burke Company. The complaint alleged that since Burke Rental's inception in 1956, plaintiff continuously acted as President and Chairman of the Board of Directors of the family business "until forcibly removed in the summer of 2005 by Michael C. Burke, Kevin Burke and John C. Burke."

Plaintiff's complaint further alleged that in the summer of 2005, plaintiff's son, Thomas P. Burke, resigned from the family business, and that shortly thereafter the individual defendants negotiated to sell the company to United Rental. The complaint alleged that the deal negotiated was flawed, however, because it required Thomas P. Burke to sign a non-compete agreement when he in fact had already resigned from the company and taken employment with a competitor. The complaint alleged that the individual defendants breached their fiduciary duties to the family business, attempting in underhanded fashion to enrich themselves at the expense of the business and their own family. The complaint alleged that plaintiff's son, Thomas P. Burke, refused to sign off on the sale of the family business, but that notwithstanding, plaintiff was at all times perfectly willing to sign off on the sale in order to avoid disharmony in the family. The complaint alleged that because plaintiff is the father of the person that unilaterally killed the deal that would have enriched the individual defendants, and because the individual defendants could not hurt Thomas P. Burke, since he had left the company, plaintiff bore the wrath of the individual defendants, who made his day to day work life "a living hell."

Plaintiff's first count alleged wrongful discharge. He alleged that the company policy was to not discharge employees as long as they perform in accordance with the law, and that

[1] Plaintiff's second suit alleged that Cyril J. Burke, Inc. (a defendant in plaintiff's first suit), was eventually merged into Burke Rental Services (a defendant in plaintiff's second suit).

plaintiff's employment was based on the policy that he would not be terminated except for good cause. Plaintiff alleged that he relied on these policies, and was not terminated for good cause.

Plaintiff's breach of fiduciary duty count alleged that on information and belief, sometime between late 2004 to early 2005, the individual defendants began ignoring their fiduciary obligations to the family business, including conspiring to and engaging in behind the scenes negotiations to sell the family business out from under plaintiff, on terms highly favorable to them but unfavorable to plaintiff and the family business. Plaintiff alleged that when his son refused to sign off on the deal, defendants punished plaintiff by terminating him and locking him out of his own family business.

Plaintiff also sought an accounting of the family businesses. He alleged that since the individual defendants unlawfully terminated and locked him out of the family business in July 2005, they ceased making regular reports to plaintiff, ceased authorizing plaintiff access to the books and records, and failed and refused to provide financial information, such that plaintiff cannot reasonably be expected to ascertain the extent of business conducted or the current accurate status of assets, liabilities, and activities of the family business. Plaintiff requested the court to enter a judgment compelling defendants to prepare, at their expense, a true and accurate accounting of the business' activities and to reimburse plaintiff for costs and attorney fees incurred in representing the family business in derivative fashion. Finally, the complaint sought dissolution of the two companies because the directors/shareholders are unable to agree by requisite vote on material matters regarding management of the corporation's affairs, and unable to carry on the business in conformity with its stated purpose and/or in the best interests of all the company's members.

Defendants moved for summary disposition under MCR 2.116(C)(7), asserting that the release provision of the settlement agreement is clear and unambiguous and reasonably susceptible to only one interpretation—that it bars any and all claims plaintiff may bring against defendants, and thus precludes plaintiff's second suit.

The circuit court agreed that the release barred plaintiff's second suit and dismissed plaintiff's case with prejudice. The court denied defendants' request for sanctions.

I

This Court reviews de novo the circuit court's grant of summary disposition to defendants under MCR 2.116(C)(7). *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). "Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." *Traver Lakes Community Maintenance Assn v Douglas Co*, 224 Mich App 335, 340; 568 NW2d 847 (1997).

The scope of a release is governed by the intent of the parties as expressed in the release; if the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). A release is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). That the parties dispute the meaning of the release does not, in itself, establish an ambiguity. *Id.* The question whether a release is ambiguous is a

question of law. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 563-564; 596 NW2d 915 (1999).

A

Plaintiff argues that the parties' intent as expressed in the release's language was that the release preclude "any and all . . . claims . . . , which arise out of the matter, transaction and/or occurrence relating to the subject policies of insurance. . .", i.e., the insurance policies that were the subject of plaintiff's first suit. Plaintiff asserts that defendants' interpretation of the release—that it bars any and all claims plaintiff may assert against defendants--renders superfluous the language "the subject policies of insurance," as well as the language "actions . . . existing as of the date hereof."

Defendants focus on the terms "all" and "including" in the release provision, arguing that "all" leaves no room for exceptions, and that "including" must be read as a term of enlargement, not of limitation, and that plaintiff's interpretation requires that the term "including" be read as a term of limitation.

B

"It is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation." *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004), citing *Haveman v Kent Co Road Comm*, 356 Mich 11, 18; 96 NW2d 153 (1959). 2A Sutherland, *Statutes and Statutory Construction*, § 47.33, pp 487-492, states:

> § 47.33 **Referential and Qualifying Words.** Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.
>
> *Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma*. [Emphasis added.]

The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." Sutherland, *supra.* In the release, the last antecedent to the qualifying phrase "which arise out of the matter . . ." is "including any and all liabilities and claims." Preceding that last antecedent would be the antecedent phrase "from any and all manner of actions. . ."

Given that the release's qualifying phrase—"which arise out of the matter . . . relating to the subject policies of insurance . . . "—is separated *from the various antecedents* by a comma,

we conclude that under the exception to the antecedent rule of construction, quoted *supra*, the release is reasonably susceptible to the interpretation advanced by plaintiff - - that the release bars "any and all manner of actions, claims, suits . . . which arise out of the matter, transaction and/or occurrence relating to the subject policies of insurance and existing as of the date hereof."

C

We further observe that while the cases cited by defendants support that the term "all" "leaves no room for exceptions," see *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994), mod on other grounds *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994), and *Romska v Opper*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999), these cases[2]

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[2] Defendants relied on cases including *Skotak, supra*, in which the plaintiff's decedent suffered a fatal heart attack while in the sauna at one of the defendant's facilities. The plaintiff alleged that the defendant was negligent in failing to ensure that its staff was trained to respond to such emergencies. The decedent and the defendant had contracted as follows:

> By the use of the facilities of the Seller . . . the Member expressly agrees that Seller shall not be liable for any damages arising from personal injuries sustained by the Member . . . on or about the premises . . . or as a result of their using the facilities and equipment therein. . . . Member assumes full responsibility for any injuries, damages or losses which may occur to Member or guest, in, on or about the premises of said gymnasiums *and does hereby fully and forever release* and discharge Seller and all associated gymnasiums, their owners, employees and agents *from any and all claims, demands, rights of action, or causes of action, present or future, whether same be known or unknown*, anticipated, or unanticipated, *resulting from or arising out of* the Member's or his guests use or intended use of the said gymnasiums or the facilities and equipment thereof. [Emphasis added.]

This Court in *Skotak, supra*, noted

> It is not contrary to this state's public policy for a party to contract against liability for damages caused by its own ordinary negligence. *Dombrowski v City of Omer*, 199 Mich App 705, 709; 502 NW2d 707 (1993) [other citations omitted].
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> * * *
>
> We reject plaintiff's claim that the quoted provision is ambiguous. The inclusive language 'any and all claims, demands, damages, rights of action, or causes of action, . . . arising out of the Member's . . . use of the . . . facilities,' clearly expresses defendant's intention to disclaim liability for all negligence, including its own. See *Pritts v J I Case Co*, 108 Mich App 22, 29-31; 310 NW2d

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261 (1981). Thus, the interpretation of the contract was a question of law for the court to decide. *In Re Loose*, 201 Mich App 361, 366; 505 NW2d 922 (1993).

> Plaintiff concedes that the provision quoted above releases defendant from liability for slip and fall injuries sustained as a result of improper use of fitness equipment, but contends that the language does not extend to negligent training and supervision. We fail to see how such a line can be drawn. We do not believe that the risk that medical assistance might not be available is somehow less foreseeable than the danger of a slip and fall injury. In any event, *there is no broader classification than the word "all." In its ordinary and natural meaning, the word "all" leaves no room for exceptions*. *Pritts, supra* at 30. Therefore, assuming that defendant was negligent in failing adequately to train and supervise its employees, any claim arising out of that negligence would be barred by the release clause the decedent signed.
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> In this case, the only factual development that could lead to a conclusion that the release was invalid would be a showing of fraudulent or over-reaching conduct, because the record contains no allegation that the decedent was not of sound mind when he signed the membership contract or that defendant misrepresented the nature of the contract. However, plaintiff does not argue this point in her brief. We therefore conclude that she was waived any claim of fraud. [203 Mich App at 619-620. Citations omitted, emphasis added.]

Unlike the instant case, the issue in *Skotak* was whether the plaintiff's claim of negligent training and supervision was barred by the provision in the parties' contract that provided that the plaintiff forever and fully released the defendant from "any and all claims, demands, damages, rights of action, or causes of action, . . . arising out of the Member's . . . use of the . . . facilities." The decedent's use of the facilities, i.e., use of the sauna, resulted in his heart attack, thus it was clear that his injuries arose out of his use of the facilities. This Court concluded that the release clearly expressed the defendant's intention to disclaim liability for all personal injuries, including injuries due to its own negligence. Unlike the instant case, the release at issue in *Skotak* is not reasonably susceptible to several interpretations; its coverage does not change depending on whether the antecedent rule or exception thereto are applied to it.

Defendants also relied below on *Gramer v Gramer*, 207 Mich App 123; 523 NW2d 861 (1994), in which, during the pendency of the parties' divorce action, the defendant wife filed a criminal complaint against the plaintiff husband alleging spousal abuse. As a result, the plaintiff brought suit against the defendant, alleging false arrest, false imprisonment, malicious prosecution and abuse of process. The circuit court dismissed the plaintiff's claims, on the basis of the following property settlement language contained in the parties' divorce judgment:

> Whereas, the parties are desirous of definitely and for all times settling and determining *all matters of property*, and *all other claims or rights* between them which *may have arisen or might arise out of the marriage relationship* between them *and as a result of the action for divorce*. [Emphasis added.]

This Court affirmed, noting:

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> In the instant case, there is no claim of any factor such as fraud or duress. The language of the release provision is unambiguous and unequivocal. In such cases, the scope of a release is governed by the intent of the parties as it is expressed in the release. *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 496; 478 NW2d 914 (1991). The parties' property settlement agreement clearly expresses their intent to settle 'for all times . . . all claims or rights between them' arising out of the parties' marriage and subsequent divorce. Plaintiff's tort claims against defendant arose out of the parties' marriage relationship and, there were subject to the parties' agreement. The trial court's construction of this agreement was proper in light of the clear contractual language.
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> Further, a right of action has been determined to be property subject to property division. Accordingly, plaintiff's tort claims were includable in the property settlement agreement. Even assuming plaintiff's tort claims are not marital property, the property settlement agreement unambiguously expresses the parties' intention to resolve more than claims regarding marital property. The release pertains to 'all matters of property, *and all other claims or rights* between [the parties] . . . .' A property agreement that purports to settle all claims arising from the marriage and divorce bars future or existing tort claims brought by one spouse against another. Therefore, we affirm the dismissal of plaintiff's claims. [207 Mich App at 125-126, certain citations omitted.]

Unlike the instant case, in *Gramer* the issue was whether the plaintiff husband's suit against the defendant wife for false arrest, false imprisonment, malicious prosecution and abuse of process was barred under the broad wording of the parties' divorce judgment, which precluded all matters of property and all other claims or rights that arose from the marriage relationship or the divorce action. Grammatical/statutory construction was not at issue and the scope of the claims barred did not differ depending on whether the antecedent rule or its exception was applied.

Defendants also relied below on *Romska*, *supra*, which involved a motor vehicle accident. Daskal owned and Velikov was driving the vehicle that struck the plaintiff's vehicle in this case. The defendant Opper allegedly caused Velikov to swerve into oncoming traffic and strike the plaintiff's vehicle. Without bringing suit, the plaintiff filed personal injury claims with Farm Bureau Insurance, which insured the Velikov vehicle, and American States Insurance Company, the defendant Opper's insurer. The plaintiff settled with Farm Bureau and the two executed a standard release form, which provided in part:

> I/we hereby release and discharge Boyan Daskal and Veliko Velikov, his or her successors and assigns, and *all other parties, firms, or corporations who are or might be liable*, from all claims of any kind or character which I/we have or might have against him/her or them, and especially because of all damages, losses or injuries to person or property, or both, whether developed or undeveloped, resulting or to result, directly or indirectly, from an accident which occurred on or about May 16, 1994 at [left blank] and I/we hereby acknowledge full settlement and satisfaction of all claims of whatever kind or character which I/we may have against him/her or them by reason of the above-named damages, losses or injuries.

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do not shed light on the fundamental issue posed in the instant case: whether the qualifying phrase "which arise out of the matter, transaction or occurrence relating to the subject policies of insurance" modifies the "any and all manner of actions" language, or whether it modifies only the immediately preceding phrase, i.e., the phrase beginning with "including any all liabilities and claims."[3] Further, defendants' argument that the term "including" is a term of enlargement, not of limitation, also finds support, but so does the view that it is a term of limitation. See

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* * *

> *All agreements and understandings between the parties hereto are embodied and expressed herein* and the terms of this release and agreement are contractual and not a mere recital.

The plaintiff and American States did not settle, and the plaintiff sued Opper. The circuit court granted Opper's motion for summary disposition, concluding that the release released Opper and American States from liability. This Court affirmed, noting:

> Because defendant clearly fits within the class of 'all other parties, firms or corporations who are of might be liable,' we see no need to look beyond the plain, explicit, and unambiguous language of the release in order to conclude that he has been released from liability. "There cannot be any broader classification than the word 'all,' and 'all' leaves room for no exceptions." *Calladine v Hyster Co*, 155 Mich App 175, 182; 399 NW2d 404 (1986).
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> Concerning the analysis of the dissent, we offer the following observations: First, plaintiff provided and received consideration under the release and the release, therefore, was valid. The validity of the release having been established, we are aware of no legal rule in Michigan that precludes settling parties from waiving whatever rights they choose.
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> Second, for at least two reasons, it is inappropriate to look to parol evidence here in determining the scope of the release: (a) the language of the release is unambiguous and thereby precludes resort to allegedly contradictory parol evidence, *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997); and (b) the release contains an explicit merger clause that independently precludes resort to parol evidence. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486; 579 NW2d 411 (1998). [234 Mich App 515-516.]

Unlike in the instant case, in *Romska* the plaintiff released "all other parties . . .who might be liable" from "all claims of any kind." The issue was whether the defendant, unnamed in the release, fit under the broad language quoted above. Grammatical/statutory construction was not an issue and would not have affected whether the defendant was covered by the release under its broad language.

[3] Indeed, it may be argued that these cases in fact support plaintiff's position because in each case the "arising out of" or "resulting from" language was read as referring to the "all claims" language.

Frame v Nehls, 452 Mich 171, 178-179; 550 NW2d 739 (1996) (the term "includes" "can be used as a term of enlargement or of limitation.")[4]

We conclude that defendants were not entitled to summary disposition. Plaintiff maintained below that the instant (second) suit did not arise out of the insurance policies matter (first suit). Defendants did not argue otherwise below, nor do they on appeal. Defendants argued that the release's plain language is clear and unambiguous and susceptible to only the interpretation that any and all claims plaintiff may bring against the instant defendants are barred. Because the release is reasonably susceptible to plaintiff's interpretation—that it bars only claims, suits, etc., arising out of or related to the insurance policies that were the subject of plaintiff's first suit—the circuit court improperly granted defendants summary disposition.

II

In light of our disposition, we need not address plaintiff's remaining arguments, or defendants' argument on cross-appeal that they were entitled to sanctions under MCR 2.114 for plaintiff having filed a frivolous (second) suit.

We reverse the circuit court's grant of summary disposition to defendants and remand for further proceedings. In the cross-appeal, we affirm the circuit court's denial of sanctions to defendants. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Bill Schuette

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[4] Defendants argue that under plaintiff's suggested interpretation, the term "including" (immediately preceding the qualifying phrase) would have to be read as a word of limitation, rather than of enlargement or expansion, and that definitions of "including" in case law and legal dictionaries do not comport with this interpretation. Defendants are correct that "the participle *including* typically indicates a partial list." See Black's Law Dictionary (8th ed), emphasis added. However, contrary to defendants' argument, the term "includes" "can be used as a term of enlargement *or* of limitation, and the word in and of itself is not determinative of how it is intended to be used." *Frame*, *supra*, 452 Mich at 178-179; 550 NW2d 739 (1996); see also *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 469; 633 NW2d 418 (2001). In any event, it is not necessary to read the term "including" as a term of limitation in order to agree with plaintiff that his interpretation of the release is reasonable, since the use of commas to separate the antecedent phrases renders the release susceptible of the construction advanced by plaintiff.